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October 6, 2004

VIA ELECTRONIC FILING

Marlene R. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: ***Ex Parte***, Intercarrier Compensation for ISP-Bound Traffic (CC Docket Nos. 99-68, 96-98); and Core Communications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order (WC Docket No. 03-171)

Dear Ms. Dortch:

On behalf of Pac-West Telecomm, Inc., this responds to BellSouth's October 1, 2004 letter in the above-captioned proceedings that addresses the issue of whether dial-up Internet access minutes-of-use ("MOUs") are growing or declining in any significant manner. The BellSouth letter claims that dial-up Internet access MOUs are increasing, and that, therefore, the Commission should retain the growth caps and new market rules.

BellSouth's claim that dial-up MOUs are increasing with enough significance to "disrupt ...the telecommunications industry" is a gross mischaracterization of the one page report that it appended to its filing. Rather than supporting BellSouth's claims, the report projects a decline in MOUs to below 2000 levels by 2008. Further, the single page of the report that BellSouth submitted states that the U.S. "residential dial-up market peaked in 2002" and that "the total subscriber base has gradually declined each year since."

The study claims that, despite a shrinking customer base, dial-up MOUs will increase from 2003 to 2006 by 68 million minutes. While BellSouth does not address this point, we assume that this refers to minutes per day. This *projected* growth translates into a Grand Total of $17, 374,000 in additional reciprocal compensation payments per year assuming all the MOUs are terminated at the FCC prescribed rate of $.0007 per MOU. This is a trivial sum considering that this would apply to all local exchange carriers. In this connection, a significant portion of the MOUs will be terminated by ILECs, including BellSouth. For those ISP minutes, the incumbents will receive payment at the state-approved reciprocal compensation rate. Therefore, BellSouth's claim that elimination of growth caps could have a significant marketplace impact is discredited based on its own submission. Apart from this, BellSouth has provided no other basis that would support the Commission relying on any aspect of BellSouth's letter.

As mentioned above, BellSouth, as well as CLECs, provide service to major ISPs that provide dial-up Internet access to their customers. Much of the Nation's ISP traffic is terminated by ILECs. To the extent that CLECs win any share of the slight/temporary increase in dial-up MOUs projected in the study, BellSouth would actually realize substantial cost savings. According to BellSouth's own figures, its incremental costs of terminating a call are three to four times greater than the FCC rate of $0.0007. Assuming BellSouth's cost estimates are accurate, if a CLEC wins any of the additional ISP MOUs, BellSouth will avoid its own incremental network termination cost and, instead, pay the CLEC only $0.0007 or nothing under the growth ceilings and new market restrictions, thereby realizing a savings of at least two to three times $0.0007.

The real-world reality is that broadband Internet access is increasing and dial-up is declining. "Overall growth for broadband connections rose 43 percent year-over-year, *while narrowband dropped 14 percent annually*."[1] In addition, the annual reports of major ISPs including EarthLink,[2] AOL,[3] and NetZero[4] confirm that dial-up subscribership is in a period of retraction, not growth. Dial-up access is a mature market. Against the undeniable backdrop of the accelerating growth of broadband access, BellSouth's underwhelming submission proves, rather than disproves, that the impact of removing the growth caps on incumbent reciprocal compensation payments will be essentially nonexistent. The real impact of eliminating the growth caps would be an increase in competition to serve ISPs, as LECs attempted to gain a larger share of a declining market. Such competition is good for the nation's consumers.

For this reason, the Commission must not rely on any purported excessive growth in dial-up minutes as the basis for the continuation of the otherwise anticompetitive growth caps and new market rule. The Commission established those requirements three years ago based on spurious claims by RBOCs that ISP MOUs would grow uncontrollably. The Commission should take advantage of the pending Core petition to eliminate the growth caps and new market rules. Because those restrictions are anticompetitive, and superfluous in light of essentially flat and declining dial-up MOUs, the Commission should not conclude that enforcement of these requirements is "necessary" or "consistent with the public interest" under the forbearance standards of Section 10 of the Act. Therefore, the Commission must grant the Core petition.

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1 San Diego, Phoenix and Detroit Lead Broadband Wired Cities, According To Nielsen/Netratings, Press Release (Sept. 15, 2004) (emphasis added).

2 *See* EarthLink, Inc., Annual Report on Form 10-K for the Year Ended Dec. 30, 2003 at 16 ("Our traditional, premium-priced narrowband subscriber base has been declining reflecting the increasing maturity of this service.").

3 *See* Time Warner 2003 Annual Report at 12 ("The AOL narrowband (or dial-up) service experienced significant declines in U.S. subscribers, which is expected to continue.").

4 *See* United Online, Inc., Form 10-K for the Transition Period from July 1 to Dec. 30, 2003 at 3 ("Many industry analysts estimate that, as a result of broadband adoption, the total number of dial-up accounts in the U.S. has declined and will continue to decline. While our pay access subscriber base has grown significantly, a number of the major ISPs that offer premium-priced services have recently experienced declines in their dial-up subscriber bases.").

BellSouth makes the extraordinary claim that the *ISP Remand Order* reduced or eliminated litigation and disputes concerning reciprocal compensation. To the contrary, that decision, because it did not recognize that dial-up Internet calls are subject to Section 251(b)(5), merely continued litigation. As the Commission knows, rather than settling anything, that decision was itself remanded to the Commission. For all the reasons stated by Pac-West and others in this proceeding, the Commission should create certainty in this area by determining that this traffic is subject to Section 251(b)(5).

BellSouth also contends that eliminating growth caps would have the undesirable effect of disrupting the federal reciprocal compensation scheme that has been in effect for three years. In fact, ILECs have themselves been lukewarm on the federal scheme. Only BellSouth and Qwest have effectively participated in that federal scheme from the beginning. In California, Verizon and SBC have only done so since mid-2003. The Commission should, for this reason, discount claims that eliminating caps would be unduly disruptive.

Pac-West takes this opportunity to remind the Commission that while some Internet users have migrated to broadband, thus decreasing dial-up subscribership, other consumers have joined the Internet revolution for the first time, thus making up some of the MOU transitioned to broadband. In PacWest's experience, these new Internet users often use entry-level computers and basic Internet functions. Low cost dial-up Internet service acts as the entry-level for first time users. It would be bad public policy to disincent these new Internet users from using dial-up, as they may not be able to afford to join the Internet revolution if they were forced to enter it via broadband. Today's new dial-up users are tomorrow's broadband users.

Sincerely,

Tamar E. Finn
Patrick J. Donovan

cc: Chairman Powell
Commissioner Abernathy
Commissioner Adelstein
Commissioner Copps
Commissioner Martin
Christopher Libertelli
Matthew Brill
Daniel Gonzalez
Scott Bergman
Jessica Rosenworcel
Jeffery Carlisle
Tamara Preiss